IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 953 of 1994

with

CRIMINAL APPEAL No 1075 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE R.P.DHOLAKIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SORABKHAN GANDHKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 953 of 1994
   Ms. Banna Datta for the appellants
   Ms.Hansa Punani, APP, for Respondent No. 1
2. Criminal AppealNo 1075 of 1994
   Ms.Hansa Punani, APP, for the appellant
   Ms. Banna Datta for the respondents

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE R.P.DHOLAKIA

Date of decision: 25/01/2001

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellants, by filing Criminal Appeal No.953 of 1994, under Section 374(2) of the Code of Criminal Procedure, have challenged the judgment and order dated July 30, 1994, passed by the learned Additional Sessions Judge, Mirzapur, Ahmedabad (Rural), in Sessions Case No.53 of 1993, by which judgment and order, both the appellants were convicted for the offences under Section 20(2) read with Section 2(3)(A) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and each of the appellants was sentenced to undergo R.I. for ten years and fine of Rs.1 lakh, in default, S.I. for one year.

2. Briefly stated, the prosecution case is as under: On October 12, 1992, at 12.15 hrs., an information was received by Police Inspector, Mr. V.K. Amaliyar, at Vejalpur Police Station through unarmed police constable, Bavubha Nasim, that in an auto-rickshaw bearing No.GOG 712, which was driven by original accused No.3, Mohamad Ahmed Mohmad Hussein, illicit foreign-made liquor was to be transported by the appellants from Sarkhej to Pirana. On receipt of the information, P.I Amaliyar, along with PSI, M.A. Pathan, PSI, R.C. Rathod, and personnel of the raiding party, had gone to Vishala Circle, and had kept a watch for the abovenumbered rickshaw. Before keeping the watch, P.I. Amaliyar had called two independent panchas and their presence was also secured for carrying out search of the auto-rickshaw. Auto-rickshaw No.GQG 712 was intercepted by the members of the raiding party. At the relevant time, the original accused No.3, Mohmad Ahmad Mohmad Hussein Shaikh, was driving the said rickshaw. The person of accused No.3 was searched, but no incriminating articles were found from his possession. The appellants, who were sitting on the back-seat, were searched, wherein, from a bag, which the appellants were carrying, contraband substance, charas, was found. On weighing the said substance, total weight was 1960 grams, which was valued at Rs.30,000/-. The said contraband substance, charas and the rickshaw were seized by drawing a panchanama at the place of the incident. The raiding party had drawn a sample from the said narcotic substance by affixing a slip containing the signatures of the two panchas and P.I, Vejalpur Police Station. After the procedure of search and seizure was over, contraband substance and auto-rickshaw and the appellants as well as original accused No.3 were handed over to Vejalpur Police Station for further investigation. During interrogation of the appellants and original accused No.3, it was revealed that the said contraband substance was purchased from original accused No.4, Maqsud Babubhai Kansara. Accordingly, original

accused No.4, Maqsud Babubhai Kansara was also arrested in connection with the above offence. PSI, R.C. Rathod, had lodged a complaint against the accused persons at the Vejalpur Police Station for the offences as stated above which came to be numbered as Prohibition Crime Registrar No.254 of 1992 of Vejalpur Police Station. The samples of contraband substance was sent to the Forensic Science Laboratory by the Investigating Officer. On completion of the investigation and on receipt of the report of the Forensic Science Laboratory, and Chemical Analyser, a charge-sheet came to be filed against the present appellants and the original accused Nos. 3 and 4 for the offences punishable under Section 8, 20(2) and 21 of the NDPS Act in the Court of learned Chief Judicial Magistrate, Ahmedabad, which came to be numbered as Criminal Case No.3629 of 1992. The learned Chief Judicial Magistrate, by his order dated March 17, 1993, committed the case to the Designated Court, as the Designated Court had its exclusive jurisdiction to try the offences under the NDPS Act. Accordingly, the case was transferred to the Sessions Court, at Ahmedabad (Rural), where it came to be numbered as Sessions Case No.53 of 1993.

3. Charge Exh.2 was framed against the appellants and the original accused Nos. 3 and 4 for the offences punishable under Sections 8(C), 20(2), 21, 27 and 29 of the NDPS Act. The charge was read over to the accused wherein they pleaded not guilty and claimed to be tried. To prove the charges framed against the original accused, the prosecution examined (1) P.W.1, Exh.10, Panch 1, Vasantbhai Bherulal, (2) P.W.2 Exh.12, Panch 2, Vinod Keshavlal Pandya, (3) P.W.3. Exh.14, PSI, Ranmandhsinh Chandrasinh Rathod, (4) P.W.4, Exh.15, Police Constable, Bavubha Narshi, (5) P.W.5, Exh.18, Police Constable, Ashokkumar Dahyabhai, (6) P.W.6, Exh.19, Mustufa Sulemanbhai, (7) P.W.7, Exh.20, Scientific Officer of FSL, Atmaram Ratilal, (8) P.W.8, Exh.28, Scientific Officer of Mobile Investigation, Biology Department of FSL, Devendrakumar Navinchandra Dave, and (9) P.W.9, Exh.31, P.I. V.K. Amaliyar. The prosecution also produced documentary evidence such as panchanama of search and seizure at Exh.11, complaint lodged by PSI, Rathod at Exh.15, report of FSL at Exh.21, etc. to prove the charges against the accused. On completion of evidence led by the prosecution, the learned Additional Sessions Judge questioned the accused and their statements came to be recorded under Section 313 of the Code of Criminal Procedure. The defence of the all the accused persons was of denial.

4. The learned Additional Sessions Judge, after appreciating the oral as well as documentary evidence and the arguments advanced by the learned advocates for the parties, concluded that the raiding party had not violated mandatory provisions of Sections 41, 42, and 50 of the NDPS Act in carrying out search and seizure of accused Nos.1, 2 and 3. The learned Additional Sessions Judge concluded that the appellants (original accused Nos. 1 and 2) were having conscious possession of narcotic substance for which they did not possess any pass or permit. However, the learned Additional Sessions Judge came to the conclusion that, with regard to original accused no.3 who was a rickshaw driver and the original accused No.4 from whom it was alleged that the narcotic substance was purchased, no evidence was led involving them with the commission of crime and, therefore, the original accused Nos.3 and 4 came to be acquitted from the charges framed against them. The learned Additional Sessions Judge in view of the finding and conclusion arrived at in the impugned judgment, convicted the present appellants for the offences punishable under Section 20(B)(2) read with section 2(3)(A) read with Section 29 of the NDPS Act, and sentenced each of the appellants to undergo R.I. for ten years and fine of Rs.1 lakh each, in default S.I. for one year, which has given rise to filing of this appeal by the appellants.

5. Criminal Appeal No.1075 of 1994 is filed by the State of Gujarat under Section 377 of the Code of Criminal Procedure for enhancement of sentence imposed by the learned Additional Sessions Judge.

6. As common question of facts and law arise for our consideration, we propose to dispose of both the appeals by this common order.

7. Learned counsel Ms. Banna Datta for the appellants and learned Additional Public Prosecutor, Ms. Hansa Punani, have taken us through the entire record and proceedings of the case.

8. Learned counsel for the appellants has submitted that even though it was a chance recovery, the raiding party or the Officer who was carrying on the search, was bound to follow the mandatory provision of Section 50 of the NDPS Act. The learned counsel for the appellants has placed reliance on the decision of the Supreme Court in the case of Mohinder Kumar vs.l The State, Panaji Goa, reported in AIR 1995 Supreme Court 1157, wherein it is ruled that, when the police officer while on patrolling

duty effected search and seizure of charas from the accused without recording the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of charas and did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the NDPS Act, and also did not adhere to the provisions of Section 50 of the NDPS Act in as much as he did not inform the person to be searched that if he would like to be taken to a Gazetted Officer or a Magistrate, the mandatory provisions of Sections 42 and 50 of the NDPS Act were not complied with, with the result the accused would be entitled to be acquitted. In our opinion, the decision of the Supreme Court in the case of Mohinder Kumar (supra) will not be of any help to the appellants., for the reasons stated hereinafter. Learned counsel for the appellants also submitted that, before carrying out search of the appellants, the raiding officer had not followed the mandatory provisions of Section 50 of the Act inasmuch as the appellants were not informed of their right before search in presence of a Gazetted Officer or a Magistrate. The submission of the learned counsel for the appellants deserves to be rejected in view of the pronouncement of the Constitution Bench of the Supreme Court in the case of State of Punjab vs. Baldev Singh, reported in AIR 1999 Supreme Court 2378 [=1999 SCC (Cri.)1080]. The Apex Court, in paragraph 11 of the judgment in Baldev Singh' case, has observed as under:

"11. Section 50 of the Act prescribes the conditions under which search of a person shall be conducted. Sub-section (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest Gazetted Officer or the Magistrate for the purpose. Under sub-section (2) it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such Gazetted officer or the Magistrate. Sub-section (3) lays down that when the person to be searched is brought before such a Gazetted Officer or the Magistrate and such Gazetted Officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct that the search be made."

In paragraph 12, the Apex Court has ruled that:

"On its plain reading, section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or

causes arrest of person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of section 50 of the Act are not attracted."

(Emphasis supplied)

9. Admittedly, the raiding party had prior information that, in the auto-rickshaw bearing No.GQG 712, illicit foreign-made liquor was to be transported from Sarkhej to Pirana. The raiding party had gone to intercept the said rickshaw on the information that it was transporting illicit foreign-made liquor. Incidentally, on search of the said rickshaw, contraband substance was found, which was defined under the NDPS Act. As per the principle laid down by the Supreme Court in Baldev Singh' case, if there was no prior information, and it was a chance recovery, in our opinion, the provisions of Section 50 of the NDPS Act will not be attracted to the facts of this case.

10. However, the learned counsel for the appellants has vehemently submitted that the search of a bag, which is carried by a person, would attract the provision of Section 50 of the Act, because, ultimately, it would amount to search of a person. In support of the above submission, the learned counsel for the appellants has placed reliance on the decision of the Supreme Court in the case of Kalayath Nassar vs. State of Kerala, reported in 2000 AIR SCW 271, wherein the Apex Court has, following the decision of the Constitution Bench in the case of Baldev Singh (supra), wherein, it has been held that a search conducted in violation of Section 50 of the Act would vitiate the search and prejudice would be caused to the accused if the requirements are not complied with, acquitted the accused in the said case on the ground that the search was illegal. As observed earlier, there was no prior information as contemplated by Section 42 of the Act. The raiding party had gone to apprehend and search the auto-rickshaw on information that foreign-made liquor was going to be transported in the said auto-rickshaw from Sarkhej to Pirana. There was no prior information with regard to transportation of Narcotic substance. In view of the pronouncement of the Supreme Court in the case of Baldev Singh (supra), as there was no prior information, requirement of Section 50 of the NDPS Act would not be attracted. Therefore, in our opinion, the judgment on which reliance is placed by the learned counsel for the appellants in the case of Kalayath Nassar (supra) will not be applicable to the facts of the present case.

11. The learned counsel for the appellants has also assailed the conviction of the appellants on the ground that there were some contradiction in the evidence of the raiding party with regard to which Officer of the raiding party had called two panchas. It was also submitted that no preliminary panchanama was drawn at the police station after calling the panchas. In our opinion, the contradiction, which has been pointed out by the learned counsel for the appellants, does not destroy the substratum of the prosecution story and it does not make the search and seizure of the narcotic substance illegal. There was no prior information about carrying narcotic substance and, therefore, no preliminary panchanama was prepared with regard to narcotic substance at the police station which is being a chance recovery. As soon as the narcotic substance was found from the possession of the appellant No.1, the raiding party had followed the procedure as laid down under the Act. The learned counsel for the appellants also submitted that there was contradictory evidence with regard to weighing of narcotic substance. The learned counsel for the appellants submitted that, as per the evidence of the raiding party, P.W.5, Police Constable, Ashokbhai Dahyabhai, had gone to call P.W.6, Mustufa Sulemanbhai, along with a weighing-scale to weigh the muddamal substance. But, as said Mustufa Sulemanbhai turned hostile, there was no convincing evidence to establish that the muddamal was weighed in the weighing-scale brought by Mustufa Sulemanbhai and this contradiction would destroy the prosecution story that the muddamal substance weighing 1960 grams was actually found from the possession of appellant No.1. We do not find any inconsistency in the prosecution version with regard to weighing of narcotic substance in the weighing-scale brought by Mustufa Sulemanbhai. Merely because P.W.6, Mustufa Sulemanbhai did not support the evidence of P.W.5, Ashokbhai Dahyabhai, who had gone to call him to bring his weighing-scale, it cannot be held that no such weighing-scale was called for through Mustufa Sulemanbhai to weigh narcotic substance. The prosecution version that the muddamal substance was found from the bag which was in the possession of the appellant No.1, was proved beyond reasonable doubt. The search and seizure was also duly proved through the evidence of the raiding party and the evidence of P.W.2, Vinod Keshavlal Pandya. The report of the FSL also indicated that narcotic substance which was seized from the possession of appellant No.1, was a prohibited substance and is defined under the Act. Therefore, in our opinion, the conviction of the appellant No.1 that he had possessed narcotic substance,

i.e. charas, in the quantity of 1960 grams is eminently just and proper. Consequently, the sentence imposed on appellant No.1 is also just and proper.

12. Learned counsel for the appellants has vehemently submitted that there was prior information that appellants Nos.1 and 2 and original accused No.3, who was rickshaw driver, were carrying illicit foreign-made liquor in the auto-rickshaw and the said liquor was to be transported from Sarkhej to Pirana and, on that information, the raiding party had carried out the search of the said auto-rickshaw. The learned counsel submitted that the original accused No.3, namely, rickshaw driver, was acquitted by the Sessions Court on the ground that no incriminating substance was found from his possession and it could not be held that the original accused No.3 was having conscious possession of narcotic substance, which was carried by the appellant No.1, The learned counsel for the appellants submitted that, on the said reasoning, the original accused No.3 was acquitted by the Sessions Court. The learned counsel for the appellants further submitted that the same reasoning would apply to the case of the appellant No.2 from whose possession nothing was found by the raiding party. The learned counsel for the appellants submitted that no evidence was led by the prosecution that the appellant No.2 aided or abated the appellant No.1 in carrying out nefarious activity of transporting narcotic substance in the said rickshaw. The learned counsel for the appellants submitted that merely because the appellant No.2 was sitting by the side of the appellant No.1, it cannot be held that he had knowledge that appellant No.1 was carrying narcotic substance and he had aided and abated the appellant No.1 in carrying out the said illegal activity and, therefore, as no case was made out against the appellant No.2 for abatement or criminal conspiracy to carry on such illegal activity with the appellant No.1, he should be acquitted of the charges framed against him. In our opinion, the submission of the learned counsel for the appellants deserves no consideration. There was prior information received by the Vejalpur Police Station that three persons were carrying illicit foreign-made liquor in the auto-rickshaw which was to be transported from Sarkhej to Pirana. Therefore, there was information that the appellants were doing illegal activities of transportation of illicit foreign-made liquor. The auto-rickshaw driver was acquitted by the Sessions Court on the ground that he had no knowledge that the appellants were carrying contraband substance in his auto-rickshaw. In our opinion, on the ground on which the original accused no.3, namely, auto-rickshaw driver

was acquitted, the appellant No.2 cannot claim to be acquitted. The appellant No.2 was sitting in the back-seat of the rickshaw with the appellant No.1 who was carrying a rexin bag in which narcotic substance was kept. The bag was very much visible to the appellant No.2 and, therefore, he had knowledge that the appellant No.1 possessed narcotic substance which was meant for sale. The evidence which was led before the Sessions Court clearly indicated that the appellant No.2 had abated and aided the appellant No.1 in carrying out the illegal activity of possessing and selling narcotic substance as defined under the Act. The case of the appellant No.2 cannot be equated with the case of the original accused No.3. It cannot be said that the appellant No.2 was merely a passenger in the auto-rickshaw without knowledge that the appellant No.1 was possessing narcotic substance which was meant for sale. The facts and circumstances emerging from the evidence of the prosecution clearly established that the appellant No.1 and the appellant No.2 abated each other in carrying out illegal activities of possessing narcotic substance which was meant for sale. The ingredients of Section 29 of the Act for abating and criminal conspiracy to commit an offence under the Act would clearly get attracted to the facts of the present case. The appellant No.2 had knowledge that the appellant No.1 was carrying narcotic substance in the bag which he was carrying and the narcotic substance found in the bag was meant for sale. Therefore, the learned Sessions Judge was justified in convicting appellant No.2 with the aid of Section 29 of the Act. Therefore, we uphold the conviction of the appellant No.2 under Section 29 of the Act and maintain the sentence imposed on him.

13. So far as Criminal Appeal No.1075 of 1994 which is filed by the State of Gujarat for enhancement of sentence imposed on the appellants is concerned, the learned Additional Public Prosecutor has submitted that narcotic substance which was found from the possession of the appellant weighing 1960 gram of charas was valued at Rs.30,000/- and looking to the quantity of narcotic substance, charas, the learned Judge ought to have imposed the major penalty. In our opinion, the submission of the learned Additional Public Prosecutor deserves to be rejected. It can be stated that, as per the provision of Section 20(b) of the NDPS Act, the maximum sentence that can be imposed is of 20 years and fine of Rs.1 lakhs. The learned Additional Sessions Judge, while imposing the minimum sentence of 10 years and fine of Rs.1 lakh on each of the appellants, has

given cogent and convincing reasons. The learned Additional Sessions Judge had also taken into account the quantity of narcotic substance. We do not find any inadequacy in the sentence and the fine imposed on each of the appellants and there is no good reason to enhance the sentence and the fine imposed on the appellants. Therefore, in our opinion, the State of Gujarat has not made out any case to enhance the sentence imposed by the Sessions Court. Therefore, Criminal Appeal No.1075 of 1994, which is filed by the State of Gujarat, deserves to be rejected.

14. As a result of foregoing reasons, Criminal Appeal No.953 of 1994, filed by the appellants (original accused Nos.1 and 2) is dismissed. The conviction of the appellants under Section 20(2) read with section 2(3)(A) read with section 29 of the NDPS Act, and sentence imposed on each of the appellants to undergo imprisonment of R.I. for ten years and fine of Rs.1 lakh, in default, S.I. for one year, are hereby confirmed and maintained.

15. Criminal Appeal No.1075 of 1994 filed by the State of Gujarat for enhancement of sentence is hereby dismissed. The muddamal, narcotic substance, be destroyed in terms of the direction given in the judgment and order dated July 30, 1994, passed by the learned Additional Sessions Judge, Mirzapur, Ahmedabad (Rural), in Sessions Case No.53 of 1993.

January 25, 2001 (M.H. Kadri, J.)

(R.P.Dholakia, J.)

(swamy)